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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 756

BASCOM LAUNDER CORP., BLUE ROSE LAUNDRY CORP., MORTON KAISER, DANIEL LEVITT, AL ABRAMS, AL ABRAMS and NATHAN NEWMAN, co-partners doing business as FAVORITE LAUNDERS, SIDNEY BENSON, doing business as BENSON'S LESTER COOPER and SAMUEL STEIN, co-partners doing business as COOPER AND STEIN, FAVORITE LAUNDERERS, INC., FLEISCHMANN ENTERPRISES, INC., JOHN L. MACKEY, BEVERLY MACHINE SERVICE, INC., DONALD STANLEY ENTERPRISES NO. 1, INC., ANTHONY FERRANDINO and VINCENT FERRANDINO, individually and as co-partners, ARTHUR ISQUITH, IRVING RANDELL and MURRAY RANDELL, individually and as co-partners, ARTHUR SLUTSKIN, ANGELO ZAGARDO and FRANK ZAGARDO, individually and as co-partners suing for themselves and for all others similarly situated,

Petitioners,

against

TELECOIN CORPORATION,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
PETITIONERS MISSTATE THE PROBLEM	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
History of the Litigation	5
The Origin of Telecoin Corporation	6
Development of Launderette System	7
Bendix-Telecoin Contract	7
The Launderette System	8
Launderette Franchises	9
Launderette Supplies	11
Route Operators	11
The Bendix "Monopoly"	12
SUMMARY OF ARGUMENT	14
ARGUMENT	16
Economic Basis for Bendix-Telecoin Contract	20
Complete Failure of Proof as to Bendix Monopoly	22
CONCLUSION	24

PAGE

American Tobacco Co. v. United States, 328 U. S. 781, 809 (1946) 21

American Seagreen Slate Co. v. O'Halloran, 229 F. 77, 79 (C. C. A. 2, 1915) 14

Applachian Coals, Inc. v. United States, 288 U. S. 344 (1933) 17, 19

Brosius v. Pepsi-Cola Co., 155 F. 2d 99, 101 (C. C. A. 3, 1946) 14

Carter-Crume Co. v. Peurrung, 86 Fed. 439 (C. C. A. 6th, 1898) 18

Eastern States Lumber Dealers Assoc. v. United States, 234 U. S. 600, 609 (1914) 22

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 (1923) 17

Hall Manufacturing Co. v. Western Steel & Iron Works, 227 Fed. 588 (C. C. A. 7th, 1915) 20

Kelly-Springfield Tire Co. v. Bobo, 4 F. 2d 71 (C. C. A. 9th, 1925), cert. den. 268 U. S. 694 18

Locker v. American Tobacco Co., et al., 218 Fed. 447 (C. C. A. 2nd, 1914) 20

Marino v. United States, 91 F. 2d 691 (C. C. A. 9th, 1937), cert. den. 302 U. S. 764 22

Moon Motor Car Co. of N. Y. v. Moon Motor Car Co., 29 F. 2d 3 (C. C. A. 2nd, 1928) 18

National Fire-proofing Co. v. Mason Builders Ass'n, 169 Fed. 259 (C. C. A. 2d, 1909) 22

Packer v. Board of Standards and Appeals, etc., 62 N. Y. Supp. 2d 54 (Sup. Ct., Bx. Cty., 1946), aff'd 271 App. Div. 874, 66 N. Y. Supp. 2d 634 (1st Dept., 1946) 10

Paramount Famous Lasky Corp., et al. v. United States, 282 U. S. 30, 43 (1930) 22

PAGE

Ruddy Brooks Clothes, Inc. v. British & Foreign Marine Ins. Co., Ltd., 195 F. 2d 86, 88-9 (C. A. 7th, 1952), cert. den. October 8, 1952 22

Stemmerman v. Kelly, 150 App. Div. 735, 738, 135 N. Y. Supp. 827, 829 (1st Dept., 1912), aff'd 220 N. Y. 756 20

United States v. Aluminum Co. of America, 148 F. 2d 416, 431 (C. C. A. 2d, 1945) 21

United States v. American Tobacco Co., 221 U. S. 106 (1911) 22

United States v. Bausch & Lomb Optical Co., et al., 45 F. Supp. 387 (S. D. N. Y., 1942), affd. 321 U. S. 707 (1944) 14, 17, 18, 19

United States v. Kissel and Harned, 218 U. S. 601 (1910) 21

United States v. MacAndrews & Forbes Co., 149 Fed. 823 (S. D. N. Y., 1906), cert. den. 212 U. S. 585 .. 21

United States v. Waltham Watch Co., et al., 47 F. Supp. 524, 532 (S. D. N. Y., 1942) 21

Virtue v. Creamery Package Mfg. Co., 227 U. S. 8, 37 (1912) 14

STATUTES

15 U. S. C. §§ 1, 2 4

15 U. S. C. § 14 4

RULE

Rule 38, Supreme Court Rules 15

MISCELLANEOUS PUBLICATION

Restatement of Contracts, American Law Institute, § 516 17

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit which unanimously reversed the judgment rendered after trial before the District Court and a jury has not yet been reported. It appears at pages 23-31 of the petition and pages 357-365 of petitioners' Appendix to their reply brief in the Court of Appeals.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

Question Presented

The basic question is whether the statements of the petitioners should be accepted as true or whether the issues of fact should be presented to the jury for determination as directed by the Court of Appeals.

Petitioners Misstate the Problem

Under "Questions Presented" petitioners have set forth a statement of facts contrary to the evidence at the trial as set forth in the opinion of the Court of Appeals and in our own statement of the case hereinafter.

The petitioners first refer to "Bendix Home Appliances, Inc., sole manufacturer of a patented automatic washing machine of revolutionary design, which bore the famous Bendix trademark * * *." The situation is correctly stated in the Court of Appeals opinion (f. 359):*

> "The evidence at the trial showed the following:
> "In 1937, Bendix Home Appliances, Inc., began producing an automatic home laundry machine."

Bendix was not a party to this litigation and neither its patents nor its trade mark were in issue or in evidence at the trial.

Petitioners' statements as to the purpose of the Bendix-Telecoin contract are not supported by the evidence and represent only petitioners' interpretation of the agreement,

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*References are designated as follows:

To petitioners' appendix (f.).

To pages in respondents' printed appendix in the Court of Appeals (a).

To pages in the typewritten transcript of testimony (T.).

which is summarized in the Court of Appeals opinion (f. 360) as being one

> "* * * by which Telecoin was designated the exclusive distributor of Bendix machines to 'route' and 'store' operators * * *. Bendix agreed to 'use its best efforts' to obtain a modification of existing agreements with its other distributors to protect Telecoin's market, and Telecoin agreed to use Bendix equipment exclusively. The contract provided that Telecoin should buy the machines from other distributors. But as it worked out, the machines were sold directly by Bendix to Telecoin. When Telecoin remitted to Bendix (f. 361), the latter sent a $10 'override' to the distributor in whose geographical area the machine was sold."

The statement that "Bendix then took vigorous action to prevent and substantially succeeded in preventing resales to commercial operators by anyone but Telecoin" is unsupported by any record reference and is contrary to evidence produced at the trial (234a, 235a, 259a).

Petitioners then state "Telecoin thereupon imposed upon its customers various restrictions which Bendix approved * * *." Although an initial draft contract had a form at the end for Bendix' approval, it was shown at the trial that such contracts were withdrawn and that Bendix' approval had never been given to any operator's agreement (Ex. 122, 552a, 307a, 411a). All the plaintiffs were able to produce only two copies of such an initial agreement and the approval form by Bendix was not executed on either (Ex. 122, 552a, 305a, 411a).

At the end of petitioners' statement of "Questions Presented" it is asserted that "The jury found that each of the plaintiffs who purchased from Telecoin was damaged by the contract." This statement is both ambiguous and misleading. It is impossible to say whether the reference is to the Bendix-Telecoin contract or to the Telecoin "Launderette" franchise agreements. If it is to the latter,

the jury specifically found no damage to the plaintiffs from the alleged tie-in sales connected with these agreements. If the reference is to the former the question was not presented to the jury but was precluded by the Court's direction that it was illegal as a matter of law, which, as the Court of Appeals states, "amounted to a directed verdict for plaintiffs on this issue" (fol. 363).

Question number 1 under petitioners' "Questions Presented" appears to us to be correct.

Question number 2 appears likewise substantially correct as a question although it perhaps naturally slurs over the words "as carried out" which become very important here. As stated in the Court of Appeals opinion quoted above, the Bendix-Telecoin contract "as it worked out" was quite different from its terms, which is another important reason why its operation and effects should have been submitted to the jury.

Question number 3 is, in our view, completely erroneous. The question of the Bendix patents and trade-mark were not in evidence or involved at the trial, and petitioners' efforts to extract therefrom some *prima facie* showing of market control or monopoly is perhaps the best indication of the complete lack of any such proof at the trial. Their assertion that "There was no such issue to submit to the jury" reflects their recognition of the absence of any proof in that regard.

Question number 4 is likewise erroneous and misleading. As mentioned above, the jury made no such finding for the reason that the question was never presented to them but was determined for them by the Court's direction that the contract was illegal as a matter of law.

Statutes Involved

The pertinent provisions of the Sherman Act (15 U. S. C. Nos. 1, 2) and Clayton Act (15 U. S. C. No. 14) are set forth in the petition at pages 3 and 4.

Statement of the Case

Petitioners' statement of the case on pages 4 to 15 of their petition is so confused and contains so many misstatements and distortions that it is necessary to present our counter-statement of facts for a proper appreciation of the background of this case.

History of this Litigation

On December 21, 1948, four plaintiffs—Bascom Launder Corp., Blue Rose Laundry Corp., Morton Kaiser, and Daniel Levitt—commenced this action. The defendants originally named included Bendix Home Appliances, Inc., (manufacturer of automatic washing machines), and Bruno-New York, Inc. (a Bendix distributor) (7a). Subsequently the action was discontinued against Bendix and Bruno. Thereafter, by a series of motions, thirteen additional plaintiffs were permitted to intervene (2a); and later the action was converted to a class suit, and more plaintiffs were added, raising the total to 29 (3a).

The complaint charges that the plaintiffs, who purchased Bendix washing machines from Telecoin, were compelled either to sign a franchise agreement for the use of the trade-name "Launderette" or to purchase coin meters with the machines.

A first trial was had before Judge Charles Dewey and a jury from March 19 to April 23, 1951, when the jury was discharged for inability to agree on a verdict. On June 1, 1951 a judgment was entered dismissing the action as to defendant Eugene R. Farny, Chairman of the Board of Telecoin, as to five plaintiffs who failed to appear at the trial and one plaintiff who testified but failed to return for completion of his cross examination. Several plaintiffs voluntarily discontinued.

Nineteen plaintiffs remained when the second trial began. A verdict against Telecoin was rendered Novem-

ber 15, 1951, awarding damages to seventeen plaintiffs. No damages were found in favor of the other two. The jury found in favor of the two individual defendants, Percival and Melroy.

The defendant Telecoin appealed from the above judgment to the United States Court of Appeals for the Second Circuit, which reversed the judgment and remanded the case for a new trial. Plaintiffs filed a cross appeal from the refusal of the District Court to cancel the "Launderette" name and also from the allowance to counsel granted by the District Court. The Court of Appeals directed that the "Launderette" name be cancelled on the ground it was descriptive. Plaintiffs' cross appeal is not here involved.

The Origin of Telecoin Corporation

Prior to 1939 Eugene R. Farny and Arthur W. Percival conceived the idea of attaching coin meters to Bendix washing machines and placing them in apartment house basements for rental by tenants (282a).*

Farny and Percival incorporated the business as Telecoin Corporation on November 20, 1943. Telecoin took over the "route" business—machines in apartment basements—which then numbered 500 to 600 machines (291a). War conditions and the scarcity of machines and other equipment retarded further expansion until near the end of World War II, following which the business grew rapidly, partly as a result of publicity and the desire of individuals

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* Their first installation was in Jackson Heights, Long Island. The machines were purchased from a Bendix distributor. The business was so successful that Farny and Percival decided to sell metered washing machines (285-287a) to other operators. One of their first customers was plaintiff Al Abrams, whose initial investment was $35 (289a), the balance payable by bank note arranged by the sellers (290a). Abrams ultimately purchased over two hundred machines (408a).

to go into new ventures of their own. In the post-war period Telecoin sold all the route locations it had operated (291a) and thereafter sold machines as available, with and without meters, to operators interested in the route business.

Development of "Launderette" System

In November 1944 Telecoin decided to pioneer a new field —the placing of batteries of Bendix machines with coin attachments in stores on a self-service basis. Telecoin's first installation of this type was opened in the Metropolitan Life Insurance Company development known as Parkchester in the Bronx, New York City.*

At that time the name "Launderette" was coined by Telecoin (297a) and was used to designate self-service laundry stores operated by Telecoin.

The success of Telecoin in setting up self-service laundry stores was widely publicized by articles in *This Week,* the *Saturday Evening Post,* and releases in newspapers and trade periodicals throughout the United States (303a).

Bendix-Telecoin Contract

Early in 1945 Bendix, the manufacturer, decided to make use of Telecoin's knowledge and highly successful experience in the operation of its machines on a commercial basis.

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* A second Launderette was opened by Telecoin in Parkchester a few months after the first, and a third in South Bend, Indiana, in the spring of 1945 (298a). The fourth was opened by Telecoin in 1945 in Bethlehem, Pennsylvania, followed by Launderettes in Los Angeles and San Francisco (301a).

The operation of batteries of washing machines raised troublesome engineering, plumbing and electrical which problems, engaged the attention of Telecoin's staff, and experts—engineers and architects —were employed to give assistance (294-98a, 300a).

Telecoin was designated by Bendix as the exclusive distributor for the Bendix machine in the commercial field throughout the United States by an agreement entered into April 11, 1945 (Ex. 11) (536a). It was this contract, described above in the quotation from the Court of Appeals opinion, which the trial court, in its charge, referred to as "The principal evidence offered in support of [the] conspiracy theory" (473a, 504a).

The Bendix machine was designed for home use and not for heavy duty commercial service with a meter mechanism. At this time, prior to the end of the war, the parties were faced with shortages that confronted other industries. Rather than wait for new tools and dies and for development of a model especially adapted for commercial use, Telecoin purchased the standard model and had panels punched for coin meter attachment. A heavy duty clutch, a third bearing, a larger bearing, a bigger shaft, and other improvements found desirable for commercial use were later installed (220a, 452a).

It was not practical to sell machines for *commercial* use with the same one-year warranty allowed on machines for *domestic* use. The warranty for commercial machines was accordingly limited to a 90-day period. Distributors who supplied parts were called upon to keep larger inventories, to determine whether a 90-day warranty or a 12-month warranty applied, and to give to operators of commercial machines substantial discounts in the purchase of parts (223-4a). These business reasons required the exclusive arrangement between Bendix and Telecoin.

The Launderette System

Petitioners claimed that "Telecoin * * * refused to sell machines to operators, including the plaintiffs, unless they signed a [Launderette] 'franchise agreement' ", which required tie-ins of meters, soap, etc., etc. (pars. 17, 20, 58-60a).

Proof of this allegation is wanting.* Telecoin sold 2,906 machines (11.5% of its sales) in 1946 to stores which were not Launderettes. In 1947 this number increased to 9,147 (28.8% of Telecoin's sales) (377-78a). A number of the plaintiffs who were store operators did business without Launderette franchises (238a, 405-6a, T. 487, 1185).

The Launderette system was designed to afford each operator the goodwill attached to the system as a whole. Its essential features were use of the name Launderette on which Telecoin had spent large sums in advertising (376a), territory protection, uniform appearance of stores, aids in construction, equipment and operation, and discounts on parts up to 45% (T. 1026-8).

The system did in fact prove to be profitable for operators; a number of plaintiffs sold their Launderette businesses, realizing substantial gains (199a, 200a, 208-9a, 252-3a, 254a)—one sold his store after two months at a profit of $10,000 (254-5a).

Launderette Franchises

For persons with no prior experience (among plaintiffs were a bus driver, mechanic, lawyer, tailor, pharmacist and photo finisher) the Launderette package was attractive. If a person wished to operate a Launderette—and only in that event—a franchise agreement was required which called for a fee of $2 per machine per month.

The Launderette agreements were changed from time to time. In all cases the contract was terminable at will, except that in one instance (Ex. 40, 545a) 15 days' notice

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* Numerous witnesses testified either that Telecoin did not require a Launderette franchise (391a, 393a, 415a, 434a; T. 335, T. 2068-9), or that they desired such an agreement (124-5a, 152a; Ex. 67, 548a; T. 1511). Plaintiffs Abrams, Randell, Greenberg, Blue Rose and Zagardo operated self-service laundries without the Launderette name as did many others. (See 369a, 413a, 421-2a, 424a; T. 1108-13, T. 1130.)

was required, and in another, 60 days (Ex. X, 571a). The plaintiffs were well aware of this. Whenever they desired to terminate their franchise they merely notified the defendant to that effect (Ex. H, 558a), (Ex. J, 561a), Ex. R, 564a). A number of the plaintiffs operated under Launderette franchises for very brief periods (Levine, 1 month; Zitter, 1 and a half months; Newman and Levitt, 8 months; T. 754, 348, 305, 1222). Others operated self-service laundries with no Launderette franchise (238a, 405a, 413-4a, 421-2a, 424a; T. 487, 1185).

Some plaintiffs complained that they had to buy meters with the machines (Cpt. par. 20, 60a). Yet nine of fourteen plaintiffs who operated stores did so without meters (593a), and others purchased machines with and without meters (T. 337, 268a, 404-5a). Telecoin did recommend the use of meters in Launderette stores for a number of reasons: A metered store reduced the personnel necessary, permitted considerable saving to the operator (314a), and reduced the risk of theft.

An additional and significant reason for use of a meter was that Telecoin had encountered opposition from professional power laundries who stirred up local authorities to invoke zoning ordinances against washing machines in business districts—opposition which Telecoin disposed of by instituting a test case to establish that its system operated on a self-service principle. See *Packer* v. *Board of Standards and Appeals, etc.*, 62 N. Y. Supp. 2d 54 (Sup. Ct., Bx. Cty., 1946), aff'd 271 App. Div. 874, 66 N. Y. Supp. 2d 634 (1st Dept., 1946). An important factor in the case was the use of a coin meter—persuasive proof of the self-service nature of the business. This litigation was financed by Telecoin at the very time a number of plaintiffs were clamoring to get into the business. In fact, several of the plaintiffs testified they were awaiting the outcome before opening their stores (T. 520, 1663).

Launderette Supplies

The third amended complaint alleges that Telecoin required its franchised store operators "to buy various accessories" from it (Cpt. pars. 17d and i, 18, 20, 22; 59-62a).

A number of plaintiffs admitted that Telecoin merely recommended the purchase of supplies (263a, 340a) such as soap, clock, bags, scale, tickets, schedule pads, uniforms, etc.* No single plaintiff bought all the items of merchandise which Telecoin was in a position to furnish or recommend, and the fact is that no two plaintiffs purchased the same articles (Ex. III, 592a).

Route Operators

Five of the plaintiffs were "route operators."**

Route operators, as well as store operators who did not want to use the Lauderette name or system, were referred to the General Sales Division of Telecoin which handled such transactions (319, 329a). Over half Telecoin's sales in 1946 were to route opeartors; in 1947 the percentage was 33.7 (377-78a). The record abundantly establishes that Telecoin sold them machines without meters, as well as with Mark Time meters, Baessler meters and Telecoin meters (239a, 268a, 404-5a).

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* Other witnesses confirmed lack of compulsion in the purchase of supplies (263a, 372a, 382a, 389-90a, 391a, 394a, 417, 434a; T. 2068-9, 2227). Newman testified he "bought supplies where I could get them, and at the cheapest possible price" (T. 321). Friedman felt free to buy supplies elsewhere (T. 700).

** Al Abrams, Sidney Benson, Irving and Murray Randel, Beverly Machine Service, Inc., and Arthur Isquith. The necessity of having coin meters in connection with the operation of this type of business was admitted by Abrams, the largest route operator (402a). Benson specifically requested them (Ex. MMM, 583a).

These operators purchased machines with meters at a price less than they could purchase machines alone from Bendix dealers.† As the trial court remarked, there was no evidence of the price charged by Bendix *distributors* other than Telecoin (461a). And Telecoin's price with meters was far below *dealers'* prices for bare machines (450-1a). This was in a period of O. P. A. controls. Years after the fact these operators claimed that in oral conversations they were told that they could not purchase washing machines without meters. But not a single contemporaneous writing was offered to show that any operator at any time complained of any force or compulsion by Telecoin to require the purchase of meters. The feverish desire to obtain washing machines, regardless of price, was clearly shown (412a, 574a, 583a, 589a).

The Bendix "Monopoly"

There was no proof that Bendix had a monopoly in the manufacture and production of washing machines, and certainly none that Telecoin enjoyed such a monopoly.

There was evidence as to the total output of automatic machines by members of an association who reported production figures in 1946 and 1947 pursuant to a statistical program (T. 1851 *et seq.*). Not all washing machine manufacturers were association members and there was no proof that all members reported their production. Production by individual companies such as Thor, Maytag, Westinghouse and General Electric was not stated. The accuracy of the reports was not established. On this meager basis the District Court permitted evidence that

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† For reasons never explained, plaintiffs have claimed they should have been allowed to buy directly from Bendix wholesale distributors at the same prices they supplied Bendix dealers.

the companies which did report produced 361,631 units in 1946 and 749,083 units in 1947 (274a). During 1946 Bendix produced 287,195 units; during 1947 600,458 units (253a.).

There was no proof that Bendix at any time undertook to control production facilities or acquired sources of material or combined with its competitors in any way to affect production.

There was even less evidence of monopoly by Telecoin. During 1945 very few Bendix machines were shipped to Telecoin. Only about 10% of Bendix' total production was channelled through Telecoin in 1946, and only 5% in 1947. In 1946 and 1947 (the only two years in which it is claimed a conspiracy existed) Telecoin obtained 25,131 and 31,731 Bendix machines, respectively. If all of these machines had been allocated among the 80 Bendix distributors their (T. 1021), 8,000 to 9,000 retail dealers would have received three or four more machines apiece during each year.

During the years 1946 and 1947 the machines Telecoin obtained from Bendix were distributed in the following manner (377a, 378a):

Year	*Apartment House and Route Operators*	*Stores not Launderettes*	*Launderettes*	*Total*
1946	13,565 (54%)	2,906 (11.5%)	8,660 (34.5%)	25,131
1947	10,701 (33.7%)	9,147 (28.8%)	11,883 (37.45%)	31,731

Summary of Argument

Beginning with page 16, petitioners set forth their reasons for urging this Court to grant the writ, but other than the claim that the Court of Appeals decision creates a new legal concept and is a radical extension of the *Bausch & Lomb* case, they argue on the basis of facts (however baseless and distorted they may be) which the jury were never permitted to consider.

Neither a new legal concept nor an extension of *Bausch & Lomb* resulted from the Court of Appeals decision here. On the contrary, the Court of Appeals reaffirmed what this Court held a long time ago in *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 37 (1912):

> "The Owatonna Company did nothing more in its contract with Creamery Package Manufacturing Company than to make that company its exclusive sales agent, and *this is no violation of law.*" (Italics added.)

The Courts of Appeals for the Second and Third Circuits have similarly held that exclusive sales contracts do not constitute violations *per se* of the anti-trust laws. *American Seagreen Slate Co.* v. *O'Halloran*, 229 F. 77, 79 (C. C. A. 2, 1915); *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99, 101 (C. C. A. 3, 1946).

The District Court, in charging the jury that the Bendix-Telecoin agreement (Ex. 11) amounted to a conspiracy as a matter of law, ignored the contested questions of fact and therefore violated the most fundamental rule of jurisprudence prevailing in the United States—that questions of fact are to be decided by a jury.

The *Bausch & Lomb* case is merely the start because it stands for the proposition that an exclusive sales contract is not *per se* illegal. But if we bear in mind that the case

there was tried before the District Court without a jury, and that after reviewing the facts the trial judge came to the conclusion as a matter of law that the exclusive sales contract did not *per se* violate the anti-trust laws, it can readily be seen that the situation here presents, if anything, an *a fortiori* case, particularly when the record is examined. As the Court of Appeals pointed out, the particular paragraph of the contract (537a) upon which the charge was based (that Bendix would use its best efforts to bring about modification of its other distributorship agreements so that distributors would sell machines for commercial use only to Telecoin) was never carried out (Petition, p. 26). Telecoin purchased washing machines directly from Bendix (223a, 412a, 449a). The distributors did sell machines for commercial use (T. 1035) and although Bendix did make some effort "to persuade distributors not to sell machines to operators" it was unsuccessful (235-6a, T. 1116). Similarly there were other provisions of the contract which were never in effect either because they were impractical or were inadvisable in the light of actual experience (Ex. 122, 522a, 307a, 411a).

The sharp and vigorously contested questions of fact can only be appraised and determined by triers of fact upon proper instructions, which the Court of Appeals correctly held were not given to the jury by the District Court. The granting of *certiorari* will not decide the questions of fact present here. Accordingly, the grounds for granting *certiorari* suggested by Rule 38 of the Supreme Court Rules are absent, because there is no conflict in the decision of the Court of Appeals with that of any other Court of Appeals or of this Court. No important question of federal law is involved which should be settled by this Court. Instead of departing from the accepted and usual course of judicial proceedings, the Court of Appeals has simply followed orthodox doctrine as to the clear line of demarcation between the province of a jury and that of a District Judge.

Argument

The Court of Appeals correctly held that the charge of the Trial Court that the Bendix-Telecoin Agreement "amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law" (Petition, p. 30) was reversible error.

As mentioned above, the complaint charged the violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The plaintiffs had demanded a jury trial. The case was submitted to the jury on two theories: (1) whether Telecoin had made tie-in sales in violation of Section 3 of the Clayton Act (468a, 468a *et seq.*) and (2) conspiracy among Telecoin, Bendix and Bendix distributors such as Bruno in violation of Sections 1 and 2 of the Sherman Act (473 *et seq.*). Four written "questions" were submitted by the Trial Judge to the jury on "Theory One—Tie-In" (482a). The jury found defendant had sold Bendix machines with certain tie-ins but that such tie-in arrangements did not tend to create a monopoly or to lessen co petition and accordingly assessed no damages. No appeal was taken from the part of the verdict and it is accordingly not here involved.

On "Theory Two—Conspiracy" the Trial Judge instructed the jury (467a):

> "* * * The second theory on which recovery might be predicated is concerned with defendants' liability as resulting from conspiracy. This theory involves the application of the Sherman Act and especially Section one of that Act to the evidence in this case" with respect to "the conduct of defendants not by themselves but in concert with the manufacturer Bendix and distributors such as Bruno-New York, Inc." (467a).

The District Court was referring to the alleged multipartite conspiracy but failed to indicate even the elements of that offense. To make matters worse, it twice instructed the jury that the Bendix-Telecoin contract, itself, was an illegal conspiracy (473a, 504a).

> "The principal evidence offered in support of this conspiracy theory is a written contract between Bendix and Telecoin, one of the defendants, marked as Exhibit 11. * * * *This agreement amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law* * * *." (Italics added.)

The Trial Judge then submitted to the jury the following two questions (484a):

> "Question 5. Have the plaintiffs, or any of them, in fact, been injured in their business or property by reason of anything forbidden by the antitrust laws which has been done by the defendants?
>
> "Question 6. What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the antitrust law?"

The charge that the Bendix-Telecoin contract was a violation of the antitrust laws "as a matter of law" was erroneous. Bargains for exclusive dealing such as the Bendix-Telecoin contract are valid unless "effecting, or forming part of a plan to effect, a monopoly." *Restatement of Contracts,* American Law Institute, § 516. Many decisions recognize the validity of contracts for exclusive dealing. *United States* v. *Bausch & Lomb Optical Co., et al.,* 45 F. Supp. 387 (S. D. N. Y., 1942), aff'd 321 U. S. 707 (1944); *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933); *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S. 568 (1923);

Moon Motor Car Co. of N. Y. v. *Moon Motor Car Co.*, 29 F. 2d 3 (C. C. A. 2d, 1928); *Kelly-Springfield Tire Co.* v. *Bobo*, 4 F. 2d 71 (C. C. A. 9th, 1925), cert. den. 268 U. S. 694; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (C. C. A. 6th, 1898).

The *Bausch & Lomb* decision the Court of Appeals properly held was binding and dispositive. There Bausch & Lomb, the exclusive manufacturer of pink tinted eyeglass lenses for Soft-Lite, agreed it would neither manufacture such lenses for anyone else nor compete with Soft-Lite in selling them.

The District Court struck down the Soft-Lite distribution system (with which we are not concerned) but held the exclusive arrangement valid under the Sherman Act. An equally divided Supreme Court affirmed.

The exclusive arrangement in the *Bausch & Lomb* case was more restrictive than the one here. Bausch & Lomb was restricted in its manufacture of pink tinted lenses which had only one use—in eyeglasses. Its entire production was channeled to Soft-Lite. Bendix, on the other hand, for justifiable business reasons made Telecoin an exclusive distributor only with respect to its machines to be used commercially. Ninety percent of its production of the same machines continued to go to 80 or 90 other Bendix distributors.

The District Court in the *Bausch & Lomb* case rested its decision on two grounds: (*1*) that the restraining covenant protected Soft-Lite which was "spending large sums to develop * * * goodwill and enlarge the public patronage of a relatively new article of commerce", and (*2*) that "nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise." 45 F. Supp. 387, 398-9. Stronger reasons support the Bendix-Telecoin contract.

Even stronger reasons exist here for holding that the Court of Appeals was correct in reversing the District Judge because of the erroneous charge to the jury, because in the *Bausch & Lomb* case the Trial Judge was also the trier of the facts, and after viewing all of the facts as well as the law found that the exclusive arrangement between Soft-Lite and Bausch & Lomb did not *per se* constitute any violation of the anti-trust laws. Here the jury was not permitted to pass upon the facts but was directed under the instructions of the Court to remove them from their deliberation and to merely assess the damages.

It seems clear that the Bendix-Telecoin contract was not illegal in and of itself. As the Court of Appeals said in its opinion "the plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade." This is substantially the test applied by Chief Justice Hughes in his opinion in *Appalachian Coals, Inc.*, 288 U. S. 344, 360 (1932):

> "* * * The decisions establish, said this Court in *Nash* v. *United States*, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' See *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States*, 263 U. S. 403, 412; *Maple Flooring Association* v. *United States*, 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30, 43; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169."

Economic Basis for Bendix-Telecoin Contract

There was an adequate basis for the exclusive arrangement between Bendix and Telecoin. Telecoin had originated and developed a commercial market for Bendix Home Laundry machines in route operations and its own Launderettes. It had conducted research in the commercial self-service laundry field and had an experienced staff. It had engaged engineers and architects to prepare plans and specifications for the most advantageous arrangement of plumbing and electrical systems. It had developed a uniform method of operating the machines and had reflected credit upon Bendix in their upkeep. It undertook to train purchasers in the operation of the machines, to disclose to Bendix its ideas for improvements, to abide by local ordinances, safety rules, etc. pertaining to commercial installation. Bendix considered that separation of its commercial from its consumer business was necessary and desirable and was anxious that Telecoin's knowledge, successful experience, sales ability, and capital should be employed to promote the manufacturer's goodwill (T. 1037).

Bendix could have retained its commercial business and refused to sell to anyone. It could have sold its commercial business to another and agreed not to compete. In neither case would there be illegality. *Stemmerman* v. *Kelly,* 150 App. Div. 735, 738, 135 N. Y. Supp. 827, 829 (1st Dept., 1912), aff'd 220 N. Y. 756; *Hall Manufacturing Co.* v. *Western Steel & Iron Works,* 227 Fed. 588 (C. C. A. 7th, 1915); *Locker* v. *American Tobacco Co., et al.,* 218 Fed. 447 (C. C. A. 2d, 1914).

Complete Failure of Proof as to Bendix Monopoly

As in the *Bausch & Lomb* case, there is nothing in the record to suggest that Bendix enjoyed a monopoly.* "Mo-

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* See pages 12-13, *supra.*

nopolization" is characterized as a combination or conspiracy "to acquire or maintain the power to exclude competitors from any part of * * * trade or commerce * * * provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power". *American Tobacco* v. *United States,* 328 U. S. 781, 809 (1946). And, *cf., United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 431 (C. C. A. 2d, 1945). The record here falls far short of any showing that Bendix had, or attempted to obtain, a monopolistic position.

The Bendix-Telecoin contract itself was not a conspiracy. Conspiracy may arise from a contract, but the contract and the conspiracy are not equivalents. *United States* v. *Kissel and Harned,* 218 U. S. 601 (1910); *United States* v. *Waltham Watch Co., et al.,* 47 F. Supp. 524, 532 (S. D. N. Y., 1942). Yet the trial judge used the words "contract, combination and conspiracy" interchangeably in denouncing the Bendix-Telecoin contract. Obviously, neither Bruno nor any other distributor was a "co-conspirator" merely because of the contract; proof of participation by them would have to be shown independently. The "conspiracy"—that is, to deny plaintiffs access to distributors other than Telecoin for commercial machines—necessitated active participation by Bruno and others.*

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* The only evidence to support the claim that Bruno or any other Bendix distributor was a party to a conspiracy to deny machines to persons for commercial use was as follows:

> Levitt testified he made one inquiry of Bruno by telephone but was referred to Telecoin because Bruno, in a period of acute shortage, "didn't have any machines" (T. 1216, 243a). This is in direct conflict with testimony by Bruno's witness read by plaintiff (T. 1535), and is at variance with Levitt's testimony by deposition (244a).

(*Continued on following page*)

Facts outside the Bendix-Telecoin contract were relied upon by petitioners and dealt with the inability of operators to purchase machines in quantity from Bendix distributors, but there is no indication in the record whether this inability was due to (*1*) the alleged conspiracy, or (*2*) the natural unwillingness of distributors to sell machines except to their dealers, or (*3*) the unwillingness of distributors to sell to others until their dealers' demands for machines were met, or (*4*) the existing post-war scarcity of such machines. The jury was not allowed to weigh these questions.

It is fundamental that there must be evidence indicating conspiracy between two or more people and of concerted action on their part. *Marino* v. *United States,* 91 F. 2d 691 (C. C. A. 9th, 1937), cert. den. 302 U. S. 764; *National Fireproofing Co.* v. *Mason Builders Assn.,* 169 Fed. 259 (C. C. A. 2d, 1909); *United States* v. *MacAndrews & Forbes Co.,* 149 Fed. 823 (S. D. N. Y., 1906), cert. den. 212 U. S. 585. It is fundamental that there must be evidence that such action will have a tendency to restrict competition unreasonably. *United States* v. *American Tobacco,* 221 U. S. 106 (1911); *Eastern States Retail Lumber Dealers Assoc.* v. *United States,* 234 U. S. 600, 609 (1914); *Paramount Famous Lasky Corp. et al.* v. *United States,* 282 U. S. 30, 43 (1930); *Ruddy Brooks Clothes, Inc.* v. *British & Foreign Marine Ins. Co. Ltd.,* 195 F. 2d 86, 88-9 (C. A. 7th, 1952), cert. den. October 8, 1952.

(*Continued from previous page*)

Benson, who wanted 20 machines (338a), testified that he tried to obtain them from a Richmond distributor, Crump, in 1946 but "could not obtain the machines" from him (T. 2382-4). He then went to Telecoin.

Randell and Cooper testified that machines were unavailable except through Telecoin (T. 1182; 1564), and others that they were referred to Telecoin by Bruno (Gilman, 270-71a; Isquith, T. 1591; Blue Rose, T. 505; Greenberg, 194a). This is not surprising. Plaintiffs wished to buy at least twenty machines at a time, but distributors were allocating machines to their prewar dealers, none of whom obtained the number desired (256-8a).

The jury was never permitted to pass upon the factual questions engendered by the Bendix-Telecoin agreement, namely—

1. Did Bendix in fact use its efforts to cause its other distributorship agreements to be modified? (The testimony shows that although Bendix considered it desirable that the commercial use of the washing machine be handled by Telecoin it was by no means carried out (T. 1535, 1530-2, T. 1035, 1946, 235-6a).)
2. Did the distributors sell only to Telecoin? (The record clearly indicates that the distributors never did sell to Telecoin but instead Telecoin purchased directly from Bendix (223a, 412a, 448a).)
3. Did the distributors refrain from selling Bendix washing machines to the public as the result of a conspiracy? (As to this there was no proof whatever.)
4. Was the arrangement by which Telecoin purchased Bendix washing machines directly from Bendix rather than the distributors merely a substitute for the provision of the contract but nevertheless part of a multipartite, gigantic national conspiracy? (As to this there was no proof whatever.)

The Court of Appeals correctly appraised the record when it pointed out in its opinion that (petition, p. 29)

> "The evidence, however, was not so unequivocal, but, being in conflict and resting on oral as well as documentary evidence, was such that the jury might reasonably have drawn an inference in favor of either side."

Respondent raised other questions of law which the Court of Appeals did not decide, apparently because there was no necessity to do so in view of the remand for re-

trial, but which nevertheless would have to be determined before there could be a final disposition of the case—such as the lack of *prima facie* proof for each plaintiff, the impact of the conspiracy on each plaintiff, the incompetent and inadequate proof of damages, the acceptance of a plaintiff Abram's deposition in lieu of his personal appearance at the trial and the prejudicial conduct of trial counsel for plaintiffs.

Only by a retrial of the case before a jury with appropriate instructions by the Trial Judge can the issues of fact be determined to bring about a final result in this litigation.

Conclusion

No reason exists why this Court should grant certiorari in view of the undetermined questions of fact. The decision of the Court of Appeals delegating to the jury its time honored function is well founded. The petition should be denied.

Respectfully submitted,

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